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IN THE

Supreme Court of the United States

BOBBY L. HUGHLEY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

When a defendant charged with a specific intent offense seeks to admit evidence that he was under the intoxicating influence of cocaine and was admitted to an in-patient cocaine rehabilitation clinic on the same day he made one of the two statements for which he was convicted, should a district court refuse to admit that evidence?

II.

When a defendant seeks to exclude prejudicial evidence in a prosecution for making a false statement regarding work activities on an application for federal benefits, should a district court deny that request when the evidence relates to purported work-related activities outside the time frame of the indictment?

III.

When the United States Sentencing Guidelines require the calculation of the amount of loss proper for sentencing be based on actual loss to the government, should a district court calculate the amount of loss based on the total amount of benefits received, rather than the amount wrongly received?

IV.

When a two-point Sentencing Guidelines enhancement for more than minimal planning is routinely applied only in cases involving complex criminal activity, should a district court apply the enhancement for an exceptionally simple crime?

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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY L. HUGHLEY,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Bobby L. Hughley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on June 2, 2000.

CITATION TO OPINION BELOW

The decision of the United States District Court for the Southern District of New York (Keenan, D.J.) is not reported. The opinion of the Second Circuit is reported as *United States* v. *Hughley*, No. 99-1550, 2000 U.S. App. LEXIS 12472 (2d Cir. June 2, 2000), and is reprinted in the attached Appendix. (A.1.)[1]

STATEMENT OF JURISDICTION

The Petitioner, Bobby L. Hughley, was found guilty of two counts of making false statements in connection with the receipt of disability benefits under the Federal Employees Compensation Act, in violation of Title 18 U.S.C. § 1920, on March 22, 1999. On September 9, 1999 the District Court for the Southern District of New York sentenced Hughley to a term of twelve months and one day of imprisonment and ordered Hughley to pay restitution of $68,354.76 to the Department of Labor.

On September 15, 1999, the Defendant timely filed a Notice of Appeal of his judgement of conviction and sentence of imprisonment with the Second Circuit Court of Appeals. On June 2, 2000, the Second Circuit entered its decision and opinion affirming the judgment and the sentence of the district court. Hughley's petition for a writ of certiorari is timely filed.

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[1] "A." refers to the attached Appendix.

STATUTORY PROVISIONS AND RULES

Title 18 § 1920 states in relevant part:

"Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of chapter 81 of title 5, shall be guilty of perjury, and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than 5 years, or both."

Title 5 § 8106 states in relevant part:
"An employee who knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."

U.S. Sentencing Guidelines Manual § 2F1.1, Application Note 8, states in relevant part:

"In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses."

U.S. Sentencing Guidelines Manual § 1B1.1, Application Note 1(f), states in relevant part:

"'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense. 'More than

minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune."

Federal Rule of Evidence 401 states:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 403 states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

This petition presents questions of substantial importance regarding evidence admissible at trial and sentencing calculations. The decision of the Second Circuit, if left undisturbed, has the potential to impact numerous defendants facing trial and sentencing.

The petitioner was denied the opportunity to introduce evidence of his intoxication on the very day that he made one of the false statements for which he was convicted. As the petitioner was convicted of a specific intent crime, evidence of a diminished capacity was crucial to his defense. Had the jury been given the opportunity to properly weigh and evaluate such documentary evidence and live witness testimony it may have found him not

guilty on one count of the indictment. This would have significantly reduced the amount of time the petitioner was to be incarcerated. Evaluation of evidence is specifically within the province of a jury and is fundamental to its core function. *See United States* v. *Goldstein*, 695 F.2d 1228, 1234-35 (10th Cir. 1981) (stating that where intent is an element of the crime charged, the issue is particularly one for the jury). Juries are free to reject evidence they find unpersuasive and it is not essential to have the assistance of an expert witness, or the defendant himself, in order to perform this function.

The petitioner was also unable to prevent the jury from learning of his purported work-related activities that occurred outside the time frame of the indictment. This evidence did not tend to make the existence of any fact that was of consequence to the outcome of the action more probable than not. Moreover, the evidence unfairly prejudiced the jury and invited it to draw an impermissible inference that such evidence was proof of the fact that the defendant was working during the time frame relevant to the indictment.

This Court should grant certiorari because the Second Circuit's decision regarding the application of the Federal Rules of Evidence has the potential to prevent all defendants standing accused of committing specific intent crimes from presenting evidence that would negate the state of mind required to commit the offense. In addition, permitting evidence that is irrelevant and unfairly prejudicial will have an adverse affect on thousands of criminal trials and will make it significantly more difficult for an accused to defend himself.

The Second Circuit also rejected petitioner's challenge to the district court's interpretation of the federal sentencing guidelines. Petitioner first argued that amount of loss should be based on the amount of benefits wrongly received rather than the total amount received. Second, petitioner argued that the two-point enhancement for more than minimal planning was inappropriate in the instant case.

This Court should grant certiorari because the decision of the Second Circuit conflicts with the decision of the Fourth Circuit requiring amount of loss be based on the difference between the amounts actually received and the amount that would have been received if employment activity were truthfully reported. Because many courts will have to consider the same issue, this Court should resolve the conflict. This Court should also resolve the important question of the level of planning that is necessary for a two-point enhancement to be applied to a sentence.

1. Factual Background

In 1979, while he was employed by the United States Postal Service, Hughley suffered a herniated disc as a result of a work-related automobile accident. Hughley became unable to work and began collecting disability benefits through the United States Department of Labor Office of Workers Compensation Programs ("OWCP"). Since 1979, Hughley has filed numerous CA-1032 forms providing information about his work activities and income. (A. 18.) In February 1988 and in October 1993 Hughley submitted two CA-1032 forms in which he reported that he had been self-employed

at various times during the previous 15 months. (A. 24-28.)

In October 1995, Hughley submitted a CA-1032 form in which he responded "no" to questions whether he had been self-employed or worked for any employer during the previous fifteen months. (A. 29-30.) Hughley responded "yes" to the question whether he was "unemployed for all periods during the past 15 months." (A. 20-21.) In January 1997, Hughley submitted an inadvertently misdated CA-1032 form with the same responses as the October 23, 1995 form. In response to a request from OWCP, Hughley re-submitted the same CA-1032 form. (A. 22-24.)

The government's evidence relating to the allegation that Hughley was engaged in work-related activities between June 1994 and March 1997 showed that Hughley purchased commercial motor vehicle insurance for two trucks in July 1994 and in June 1995. Both policies were canceled for non-payment of premiums within two months of issuance. (A. 44-46.) The government also offered evidence that in 1996 and 1997, Hughley renewed previously obtained consumer business loans from a bank in Georgia and in 1995 and 1996 Hughley renewed a prior consumer truck purchase loan from the same bank. (A. 56-58.)

The government offered evidence that Hughley applied in July 1994, May 1995 and November 1996 to the Connecticut Department of Health for permits to operate a food service establishment identified as Georgia Pride Meats and Produce in New Haven, Connecticut. Government witnesses testified that between 1994 and 1997, Hughley was seen on occasion selling produce from a portable

table or a trailer on a vacant lot in New Haven. The government submitted evidence that Hughley applied for a Connecticut tax registration number to sell fruits and produce on July 8, 1994 and that he reported to the Connecticut Department of Revenue quarterly gross receipts of $3500 in September 1994, $4500 in December 1994, $3000 in March 1995 and $2800 in June 1995.

2. The Proceedings Below

After a two day jury trial, Hughley was convicted and sentenced for two counts of violating 18 U.S.C. § 1920 by making false statements in order to obtain federal disability benefits. On September 9, 1999, the district court sentenced Hughley to a term of imprisonment for one year and one day. The district court also ordered Hughley to pay restitution in the amount of $68,354.76. Hughley is currently serving his sentence. The district court had jurisdiction in the first instance in this case because the alleged crimes were violations of federal law and the defendant was sentenced pursuant to the federal sentencing guidelines.

The judgment and sentence was appealed to the Second Circuit Court of Appeals. First, Hughley challenged the district court's exclusion of documentary evidence and testimony regarding his intoxication on March 12, 1997, the day Hughley made one of the two statements for which he was convicted. The excluded documentary evidence consisted of a cocaine urinalysis test upon admission to an in-patient cocaine detoxification program at Veteran's Hospital showing the presence of cocaine. The court also excluded the testimony of the nurse who admitted Hughley to the hospital,

that based on her experience as a certified substance abuse nurse, his behavior upon admission was consistent with cocaine intoxication. The district court ruled the testimony of the nurse inadmissible, finding that there was not sufficient evidence that Hughley could not have formed an intent to defraud on March 12, 1997, and that her testimony would be subject to speculation.

Second, Hughley challenged the admission of evidence of his work activities outside of the time period covered by the indictment, such as bank loan activities, purportedly work-related meetings Hughley attended and a permit to sell produce from the New Haven Department of Health. The district court ruled that the evidence was relevant and admissible.

Hughley also challenged two aspects of his sentence. First, Hughley challenged the calculation of the amount of loss based on the entire amount of disability benefits he received during the indictment period. Second, Hughley challenged the district court's imposition of a two-level enhancement for more than minimal planning based on false statements made on at least three occasions.

The Second Circuit Court of Appeals affirmed the decision of the district court in all respects.

REASONS FOR GRANTING THE WRIT

I. Defendants Should Be Permitted to Introduce Evidence of Intoxication When Charged With Specific Intent Crimes

The trial court committed reversible error by excluding two crucial pieces of evidence of Hughley's intoxication: the testimony of Cynthia

Smith, a nurse who admitted Hughley to a cocaine detoxification center on the day of his alleged false statement (A. 67-74.), and a urinalysis test, taken by Hughley on the same day and showing the presence of cocaine. (A. 66.) Because of the centrality of this evidence to Hughley's defense, exclusion constituted reversible error. Conceding that the evidence was relevant, the Second Circuit affirmed the district court nonetheless. *Hughley*, 2000 U.S. App. LEXIS 12472 at *3.

The excluded evidence was relevant under Rule 401 of the Federal Rules of Evidence which states that "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "An incremental effect on the probability of a jury finding" on the fact in question is sufficient to establish relevancy. *Doe* v. *New York City Dep't of Soc. Servs.*, 649 F.2d 134, 147 (2d Cir. 1981). *See also United States* v. *Abel*, 469 U.S. 45, 51 (1984). Under Rule 401, "the basic standard of relevance is a liberal one." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (citing *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993)).

The evidence excluded at trial was not only relevant, but crucial to disproving the government's assertion of specific intent. Commission of a fraud against the government in violation of the general federal anti-fraud statute, 18 U.S.C. § 1001, is a specific intent crime. *See United States* v. *Yermian*, 468 U.S. 63, 64 (1984). Likewise, the specific anti-fraud statute at issue here, 18 U.S.C. § 1920, also requires proof of specific intent to defraud. *See*

United States v. *Gilliam*, 1996 WL 601399, *6 (S.D.N.Y. 1996). Because § 1920 is recognized as the offspring of § 1001, courts have construed § 1920 as containing the same basic elements as § 1001. *See United States* v. *Henry*, 164 F.3d 1304, 1308 n.2 (10th Cir.), *cert. denied*, 527 U.S. 1029 (1999); *United States* v. *Fitzgerald*, 147 F.3d 1101, 1103 n.1 (9th Cir. 1998). The textual requirements of the two statutes regarding intent are identical; both demand proof that the defendant acted "knowingly and willfully." *Compare* 18 U.S.C. § 1001(a) *and id.* § 1920.

As a specific intent crime, intentional conduct under § 1920 is subject to a defense of voluntary intoxication. It is well-settled that evidence of voluntary intoxication may be used to negate the intent element of specific intent crimes. *See United States* v. *Rahman*, 189 F.3d 88, 142 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 830 (2000) (approving jury instructions that allow intoxication to "negate the existence of the defendant's intent to commit the crime"); *United States* v. *Davis*, 183 F.3d 231, 253, *amended by*, 197 F.3d 662 (3rd Cir. 1999) ("[I]ntoxication can negate specific intent . . . .").

The excluded evidence is relevant under Rule 401 because it directly supports Hughley's voluntary intoxication defense. The testimony of Cynthia Smith and the urinalysis test results provided Hughley with one of the building blocks necessary for the construction of his defense to the government's evidence of specific intent. The excluded evidence significantly bolsters Hughley's specific intent defense and makes "more probable" the fact that Hughley was intoxicated when he executed the CA-1032 form that same day than that

fact would have been without the test. This increased probability strengthens the likelihood of Hughley's incapacitation and inability to form specific intent when he filled out and submitted the CA-1032 form.

Trial courts are empowered by Rule 403 of the Federal Rules of Evidence to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. However, numerous courts have warned that exclusion of probative evidence under Rule 403 "is an extraordinary remedy that must be used sparingly." *Koch* v. *Koch Indus.*, 203 F.3d 1202, 1229 (10th Cir. 2000) (*petition for cert. filed*); *Westcott* v. *Crinklaw*, 68 F.3d 1073, 1077 (8th Cir. 1995); *George* v. *Celotex Corp.*, 914 F.2d 26, 31 (2d Cir. 1990); *Dartez* v. *Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985); *United States* v. *Jamil*, 707 F.2d 638, 642 (2d Cir. 1983); *United States* v. *King*, 713 F.2d 627, 631 (11th Cir. 1983); *United States* v. *Thevis*, 665 F.2d 616, 633 (5th Cir. 1982).

Evidence is properly excluded because of the potential for "misleading the jury" or "confusion of the issues" when the proffer concerns matters that are tangential to the primary legal issues in the case. *See Old Chief* v. *United States*, 519 U.S. 172 (1997); *see also United States* v. *Malpeso*, 115 F.3d 155, 163 (2d Cir. 1997); *United States* v. *Dakins*, 872 F.2d 1061, 1063 (D.C. Cir. 1989) (excluding evidence under the "misleading" and "confusion" bases of Rule 403 because of its tangential nature); 2 *Jack B. Weinstein & Margaret A. Berger,*

Weinstein's Federal Evidence, § 403.05[1] (2d ed. 1997) (explaining that these two bases are used to exclude evidence that courts fear "would distract the jury from the important issues").

Failing to recognize or acknowledge the importance of this evidence to Hughley's defense, the Second Circuit determined that exclusion of this relevant evidence would not have so substantially influenced the jury as to change the outcome of the trial. *Hughley*, 2000 U.S. App. LEXIS at *4. This decision is groundless. The evidence offered by Hughley was hardly of secondary importance. Rather, it went to the heart of his defense: Hughley's mental state and ability to form specific intent at the time of the alleged fraud. The importance of evidence to a criminal defendant's defense strategy should factor heavily in a trial court's Rule 403 analysis: "'given the importance of the . . . testimony to the defense, whatever confusion . . . that may have resulted from its admission would have to have been overwhelming to satisfy Rule 403's balancing test.'" *United States* v. *Blum*, 62 F.3d 63, 68 (2d Cir. 1995) (citing *United States* v. *Harvey*, 547 F.2d 720, 723 (2d Cir. 1976)).

The trial court also failed to consider Hughley's alternatives for establishing his defense. When analyzing an item of evidence under Rule 403, a court must consider the evidence in the context of all of the evidence supporting the particular fact. *See Old Chief*, 519 U.S. at 184-85. An important factor in this contextual analysis is the "'availability of other means of proof.'" *Id.* (citing *Advisory Committee's Notes on Fed. R. Evid.* 403, 28 U.S.C. App., p. 860). In *Old Chief*, the defendant was charged with violating a federal statute that

prohibits possession of a firearm by anyone who has been convicted of a felony. This Court held that the trial court erred in allowing the government to prove the defendant's earlier felony conviction by judgment of conviction, since the defendant had offered to stipulate to his earlier conviction. Since the stipulation was alternative evidence of the felony element, Rule 403 barred the introduction of the more prejudicial judgment of conviction. In the case at hand, however, there is no indication in the record that the trial court considered the unavailability of other evidence proving intoxication before it barred Hughley's strongest evidence.

Exclusion of Hughley's evidence under Rule 403 was an error because the trial court's application of the rule was arbitrary. Most significantly, the trial court failed "to make a 'conscientious assessment' of whether unfair prejudice substantially outweighs probative value." *United States* v. *Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (citing *United States* v. *Birney*, 686 F.2d 102, 106 (2d Cir. 1982)). *See also McQueeney* v. *Wilmington Trust Co.*, 779 F.2d 916, 923 (3d Cir. 1985) (remand required where trial court "did not articulate its reasons for its finding of prejudice"). The court's analysis of the issue appearing in the record, discussed above, did not include a finding that prejudice "substantially" outweighed probative value. Because the proffered evidence was probative of the defendant's state of mind on the day of the alleged fraud, and because the evidence could only have assisted the jury in its assessment of that central issue, exclusion of Hughley's evidence constituted an abuse of discretion.

Finally, the evidence was so critical to Hughley's

defense that his Sixth Amendment rights were compromised. The Seventh Circuit has warned of the potential Constitutional ramifications of excluding a defendant's only evidence of voluntary intoxication. In *United States* v. *Hillsberg*, 812 F.2d 328 (7th Cir. 1987), the trial court did not permit a criminal defendant charged with murder to introduce expert testimony regarding the defendant's intoxication during the murder. *See id.* at 331. The Seventh Circuit affirmed the trial court's ruling because the expert's testimony improperly addressed the ultimate legal issue. *See id.* at 332. The defendant was also able to admit other evidence of his intoxication. *See id.* at 333. However, the court warned that "[t]he Sixth Amendment might come into play if Hillsberg was foreclosed from presenting evidence of his intoxication, because it was central to his argument that he did not act with the requisite intent." *Id.* Similarly, the trial court here excluded Hughley's only evidence of intoxication, despite its relevance, thereby foreclosing Hughley's ability to rebut the specific intent element of the charge.

II. Defendants Should Be Permitted to Exclude Prejudicial Evidence of Activities that Take Place Outside the Time Frame of the Indictment

The indictment alleged that, on October 23, 1995 and March 12, 1997, the defendant made false statements regarding his employment activities during the previous fifteen months. The district court erred in admitting various items of evidence relating to Hughley's purported employment-related activities *after* March 1997. The district court

admitted testimonial and documentary evidence of Hughley's bank loan activities on June 25, 1997, more than three months after the end of the period covered by the indictment. (A. 55-56.) In addition, the court admitted government witness testimony regarding purportedly work-related meetings Hughley attended in "April or May" of 1997, (A. 60-62.), and in June 1997. (A. 43.) Finally, the court admitted testimonial and documentary evidence that Hughley obtained a permit to sell produce from the New Haven Department of Health on November 14, 1997.

Such evidence should have been excluded pursuant to Federal Rules of Evidence 401 and 403. This evidence unfairly prejudiced the jury, and is irrelevant to the conduct that occurred between October 1995 and March 1997, the time period at issue. Evidence must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *Perry* v. *Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d. Cir. 1997).

Introduction of this evidence was unfair because it invited the jury to infer that such evidence is proof that the defendant was engaged in work activities during the time relevant to the indictment. In affirming the district court, the Second Circuit found that this evidence "strongly suggest[ed]" that Hughley's business was in operation during the period at issue. Hughley, 2000 U.S. App. LEXIS at *5. Such a finding was error. The inference is illogical and unsupported. *See United States* v. *Ellzey*, 936 F.2d 492, 497 (10th Cir. 1991) (evidence properly excluded under Rule 403 due to the "remote and tenuous link" between the evidence and the charged crime). Therefore, this Court

should grant a writ of certiorari to reverse the decision of the Second Circuit and order a new trial.

III. Amount of Loss for Sentencing Purposes Should Be Based on the Amount of Benefits Wrongly Obtained

In the case below, the district court determined, as a matter of law, that the amount of loss for sentencing purposes should be calculated based on the entire amount of benefits received, rather than the amount wrongly received. Reviewing this determination *de novo*, the Second Circuit summarily affirmed the decision of the district court. *Hughley*, 2000 U.S. App. LEXIS at *6. Among the circuit courts that have addressed this issue, there is a difference of opinion. *See, e.g., United States* v. *Dawkins*, 202 F.3d 711 (4th Cir. 2000), *cert. denied*, 120 S. Ct. 1989 (2000); *Henry*, 164 F.3d. at 1310. The Fourth Circuit recently ruled in a manner inapposite to the Second Circuit when it decided that the purposes of the Guidelines are best served by calculating the amount of loss based only on amounts wrongly received. *Dawkins*, 202 F.3d. at 714-15. Because this important issue has not been directly addressed by this Court it is imperative that it be reviewed now as it potentially affects every federal employee and recipient of federal workers compensation benefits.

Section 2F1.1 of the Guidelines, which governs the fraud offense of which Hughley was convicted, provides for adjustment of the offense level according to the "amount of loss." U.S. Sentencing Guidelines Manual § 2F1.1(b)(1) (1999). Loss is defined in Application Note 8 as "the value of the money, property, or services unlawfully taken." *Id.*

§ 2F1.1 Comment 8. Loss is not typically defined by the gross amount involved in the fraudulent scheme.[2] *See United States* v. *Parsons*, 109 F.3d 1002, 1004 (4th. Cir. 1997); *United States* v. *Mount*, 966 F.2d 262, 265 (7th Cir. 1992). By definition, common understanding, and logic, the amount "unlawfully taken" here is the amount of disability benefits obtained over and above the amount to which the recipient would have been entitled had he or she not understated his income.

In addition, Application Note 8(d) specifically provides that in a case involving diversion of Government benefits, "loss is the value of the benefits diverted from intended recipients or uses." U.S. Sentencing Guidelines Manual § 2F1.1 comment 8(d). This Application Note compels the conclusion that the amount of loss under the circumstances here is limited to the amount of benefits wrongfully obtained, as that is the only amount that was diverted from its intended recipients. *See Stinson v. United States*, 508 U.S. 36, 47 (1993) (Guidelines commentary interpreting or explaining a guideline is authoritative). The remainder of the benefits Hughley received -- that is, the amount to which Hughley would have been entitled even if he had fully reported his income -- cannot be said to have been diverted from its intended recipient.

The overarching rationale articulated by the

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[2] For example, according to Application Note 8(a), where "a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (*i.e.*, $30,000)." U.S Sentencing Guidelines Manual § 2F1.1 comment 8(a).

Second Circuit, in affirming the district court, was the conclusion that Hughley's benefit payments would have likely ceased altogether. *Hughley*, 2000 U.S. App. LEXIS at *6. The record provides no support for this assertion. Trial testimony showed that had Hughley reported his work-related activity, his benefits would not have been terminated, but simply reduced according to his capacity for work or his earning potential. (A. 17-19.) At best, the record shows that Hughley sporadically engaged in work-related activities during the time period in question. Most of the evidence of Hughley's work-related activities at trial related to non-physical activities such as applications for loans, vehicle insurance, permits and a tax registration number. (A. 37-39, 64.) The evidence that Hughley was actually engaged in truck driving or produce sales was limited to a handful of occasions (A. 41, 59, 62.) and falls far short of supporting a finding that Hughley was consistently or even regularly capable of and actually engaged in such activity between 1994 and 1998, such that he would have been entitled to no disability benefits whatsoever had he truthfully reported his activities. Therefore, the court's failure to offset the amount of loss attributable to Hughley's offense by the amount of benefits to which Hughley was legally entitled was error.

A. The Decision of the Second Circuit Directly Conflicts with the Fourth Circuit

In *United States* v. *Parsons*, the Fourth Circuit held that where a postal service employee was convicted of filing false claims for submission of partially fraudulent travel vouchers, the appropriate

calculation of the "amount of loss" under Section 2F1.1 was the amount of funds fraudulently obtained in excess of the amount to which she was lawfully entitled. 109 F.3d at 1005-1006. The court reasoned that "[l]oss is not the total amount of the benefits the defendant received, because some benefits may be rightfully due; instead loss is measured by the amount diverted from proper purposes." *Id.* at 1004. The court, citing holdings of four other Courts of Appeals, noted that, "in sentencing violators of [the false claims statute at issue], courts have unanimously focused upon the actual loss caused and not the entire amount involved." *Id.* at 1005 (citing *United States* v. *Leahy*, 82 F.3d 624, 638 (5th Cir. 1996); *United States* v. *Abud-Sanchez*, 973 F.2d 835, 837-40 (10th Cir. 1992); *United States* v. *Rayborn*, 957 F.2d 841, 842-44 (11th Cir. 1992); *United States* v. *Haddon*, 927 F.2d 942, 951 (7th Cir. 1991)). *See also United States* v. *Arnous*, 122 F.3d 321, 324 (6th Cir. 1997) (where convenience store owner filed false claims to Department of Agriculture for food stamp reimbursement, proper calculation of loss is amount fraudulently diverted from eligible recipients offset by the cost of the inventory to the other stores and the face amount of the food stamps). *But see Henry*, 164 F.3d at 1310 (holding proper calculation of loss is total amount of benefits received).

The *Parsons* and *Arnous* holdings recognize that the Sentencing Guidelines are intended to provide customized sentences through the use of "specific offense characteristics" such as adjustment for "amount of loss," thereby creating a "modified real offense" system which focuses at least as much on the particular offense behavior as the offense of

conviction. *See* U.S. Sentencing Guidelines Manual Ch. 1, Pt. A, intro. comment at 5-6 (1999); Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. 461, 475 (1998).

In February of this year, the Fourth Circuit again addressed the issue of "amount of loss". In *United States* v. *Dawkins*, the court faced the precise issue that the petitioner now asks this Court to address — the proper "amount of loss" calculation in the context of a sentencing for a violation of 18 U.S.C. § 1920. Following its reasoning in *Parsons* the court held that the amount of fraud loss attributable to the defendant was properly calculated as the difference between the amount of benefits actually received and the amount he would have received had he truthfully and accurately completed his forms. 202 F.3d. at 714-15. Here, as in *Dawkins*, culpability should be reflected only by the amount fraudulently taken, not the total amount of benefits received.

Declining to follow the Fourth Circuit, the district court in Hughley based its "amount of loss" calculation in large part on *Henry*. In affirming the district court, the Second Circuit necessarily relied on *Henry* as well. The reasoning of *Henry* was flawed due to its reliance on *United States* v. *Brothers*, 955 F.2d 493 (7th Cir. 1992). *Brothers* examined "amount of loss" for restitution purposes, not under the Sentencing Guidelines. As recognized by the Second Circuit, the restitution inquiry is generally different from the sentencing inquiry. *See United States* v. *Germosen*, 139 F.3d 120, 130 (2d Cir. 1998), *cert. denied*, 525 U.S. 1083 (1999).

As Judge Henry explained in his detailed and well-reasoned dissent in *Henry*, "because the purpose of using 'loss' as a factor in sentencing is as a gauge of the severity of the crime, using the entire amount of benefits received as a measure of the loss and thus as a measure of the severity of the crime makes little sense." 164 F.3d at 1312 (Henry, J., dissenting) (internal citation omitted). In his dissent, Judge Henry aptly demonstrated the inequitable and arbitrary results that flow from calculation of loss as the entire amount of benefits received, without offsetting the amount rightfully received:

> The absurdity of this calculus is best suggested by hypothetical. Consider two defendants. The first lied on her 1032 form in a manner that caused her to receive ten dollars more than she would have received but for the lie. Yet her total benefits during the period covered by that 1032 are $80,000. The second defendant lied on his 1032 form in a manner that caused him to receive $10,000 more than he would have received but for the lie, and yet his total benefits in that period amount to $11,000. I cannot imagine a rational basis for punishing the first defendant, perpetrator of a ten dollar lie, more severely than the second, whose lie is one thousand times more costly to the government.

Id. at 1312. The framers of the Guidelines did not intend such arbitrary results to flow from application of Section 2F1.1.

The calculation of the amount of loss for

Hughley cannot be reconciled with the Guidelines' purpose and intent to vary the severity of a sentence according to the severity of the offense. This calculation provides for no distinction among offenders based on the magnitude and culpability of their unlawful conduct as the Guidelines intended. This Court should grant a writ of certiorari to reverse the Hughley decision and remand for re-sentencing.

B. Amount of Loss Calculations for the Purposes of Sentencing Should Not be Tied to the Federal Civil Forfeiture Statute, Title 5 § 8106 (b)

In addition to drawing the unfounded conclusion that the petitioner would have received no benefits had he told the truth, the Second Circuit based its decision on the language of 5 U.S.C. § 8106. This reasoning is untenable. Section 8106, the civil statute governing federal disability benefits, provides for forfeiture of the entire amount of benefits received during the indictment period. Section 8106 provides, in pertinent part: that "[a]n employee who . . . knowingly omits or understates any part of his earnings forfeits his right to compensation with respect to any period for which the affidavit or report was required." § 8106 (b) (2) (2000). Citing this civil forfeiture statute, the Second Circuit stated that "5 U.S.C. § 8106(b)(2) unambiguously requires the forfeiture of all benefits Hughley collected during the period that he omitted or understated any part of his earnings". *Hughley*, 2000 U.S. App. LEXIS 12472 at *5. This is irreconcilable with Section 2F1.1 of the Guidelines, which requires that the amount of loss reflect

culpability. Culpability is unrelated to the amount a defendant may have to civilly forfeit.

Section 8106 is not relevant to the calculation of the loss and does not provide a basis for calculating the amount of loss for sentencing purposes as the entire amount of benefits received during the indictment period. Courts have repeatedly rejected reliance on similar civil forfeiture language to support loss calculations based on total benefits received. In *Parsons*, for example, the Fourth Circuit rejected the district court's calculation of loss for sentencing purposes based on the relevant civil forfeiture provision, holding that "[f]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim. The procedures for forfeiture are set forth in a comprehensive statutory framework of their own, one which is separate and apart from the Sentencing Guidelines." 109 F.3d at 1005-1006 (internal citations omitted). As the *Parsons* court noted, the Fourth Circuit has "never utilized" the forfeiture statute at issue in that case to "determine loss for other cases involving fraudulent claims against the United States." *Id.* at 1006 (citing *United States* v. *Adam*, 70 F.3d 776 (4th Cir. 1995) and *United States* v. *Castner*, 50 F.3d 1267 (4th Cir. 1995)).

Again in *Dawkins*, the Fourth Circuit held that regardless of the amount the Government may be entitled to collect, calculation of loss for sentencing purposes must be viewed differently than forfeiture. 202 F.3d at 715. And, in his dissent in *Henry*, Judge Henry illustrated how illogical reliance on the civil forfeiture statute would be through the following example:

> [T]he government has a civil cause of action in rem against a property from which drugs were sold, see 21 U.S.C § 881(a)(6), but the value of that property is certainly not used in determining the culpability of the dealers. In [the defendant's] case, the government has a civil cause of action in rem against the entire amount of benefits received during periods covered by fraudulently completed 1032 forms. [The defendant's] criminal culpability is another matter altogether.

164 F.3d at 1311.

Merely because the government has a claim in the instant case to seek forfeiture of the entire amount of benefits received by Hughley during the periods in which false statements were made, does not mean that Mr. Hughley's wrongful action caused a loss of this entire amount. That reasoning is contrary to the explicit application rules of the Guidelines, which require that loss be limited to actual loss. Here, the actual loss, and accordingly the severity of the offense, can only be fairly calculated by offsetting the total benefits received by those to which Hughley was legally entitled. Without such an offset, Hughley's sentence is not calibrated to his wrongful conduct, and such a result disregards the purpose of the Guidelines, and indeed the purpose of punishment in our criminal justice system. This Court should grant a writ of certiorari to reverse the decision of the Second Circuit and remand for re-sentencing in accordance with the correct calculation of the "amount of loss" under Section 2F1.1 of the Federal Sentencing Guidelines.

IV. A More than Minimal Planning Enhancement is Inappropriate when a Defendant is Convicted of an Exceptionally Simple Crime

The Second Circuit affirmed the district court's improper application of a two-level enhancement for "more than minimal planning" under the sentencing guidelines. U.S. Sentencing Guidelines Manual § 2F1.1(b)(2)(A) (1999). The Guidelines identify three circumstances in which this enhancement is warranted: (i) where the offense required "more planning than is typical for commission of the offense in a simple form"; (ii) where "significant affirmative steps were taken to conceal the offense"; or (iii) where "repeated acts" were committed over a period of time. *Id.* § 1B1.1, Application Note 1(f). *See also United States* v. *Rosa*, 17 F.3d 1531, 1552 (2d Cir. 1994). The Second Circuit found that Hughley's conduct was "repeated and deliberate." *Hughley*, 2000 U.S. App. LEXIS at *7. This decision is wrong and ignores an entire body of law that generally applies the enhancement when the crime also involved some level of complexity.

In support of its imposition of the planning enhancement, both courts found that Hughley made "at least three" false statements to the Department of Labor. (A. 76.) They therefore relied on the "repeated acts" language of the Guidelines commentary. This reliance was misplaced. Hughley's offense included only two false statements, not three, and it did not include the repetitive conduct over an extended period of time that has been properly held to warrant the more than minimal planning enhancement.

Courts have repeatedly held that at least three acts are required to warrant the enhancement – two acts do not suffice as a matter of law. *See United States* v. *Kim*, 23 F.3d 513, 515 (D.C. Cir. 1994) (finding that "repeated" contemplates at least three acts). Hughley's offense entailed two, not three, acts. Hughley was convicted of submitting two CA-1032 forms to the Department of Labor, one on October 23, 1995 and one on March 12, 1997. The third "occasion" to which the court referred occurred in January 1997, when Hughley mistakenly submitted a misdated CA-1032 form. (A. 22.) When Hughley was notified that the form he had submitted in January 1997 was misdated, he resubmitted a second CA-1032 form repeating the same information. (A. 23.)

The submission of the misdated form was the determinative factor upon which both courts relied in imposing the planning enhancement. This was improper because any culpability arising from the January 1997 submission is subsumed under Hughley's culpability for re-submitting the same CA-1032 form in March 1997. Indeed, Hughley was not awarded any benefits pursuant to the submission of the misdated form, as the Department of Labor required that he resubmit a correctly dated form. (A. 23.) Accordingly, imposition of the enhancement based on that finding was improper.

In addition, even assuming, *arguendo*, that Hughley made three false statements, imposition of the enhancement should nonetheless be reversed because it was not warranted by Hughley's offense. The enhancement is usually applied "to factual scenarios involving clear examples of repeated or complex criminal activity." *United States* v. *Lennick*,

917 F.2d 974, 978-80 (7th Cir. 1990). The cases in which "repeated acts" justify the planning enhancement thus typically involve a course of conduct including either active planning over a significantly long period of time or a high volume of acts in a somewhat shorter period of time. *See United States* v. *Allen*, No. 99 Civ. 1167, 2000 U.S. App. LEXIS 55, *2-*3 (2d. Cir. Jan. 5, 2000) (enhancement appropriate based on repetitiveness of thefts and on the planning entailed in the numerous affirmative steps); *United States* v. *Barrett*, 178 F.3d 643, 648-649 (2d. Cir. 1999) (enhancement appropriate where an embezzlement scheme took place over a period of six years); *United States* v. *Lewis*, 156 F.3d 656, 658 (6th Cir. 1998) (enhancement appropriate where thousands of false claims for complicated and expensive dental procedures were submitted). *See also United States* v. *Mau*, 45 F.3d 212, 214 (7th Cir. 1995) (enhancement appropriate where defendant kited a huge volume of checks over a period of seven months); *United States* v. *Bakhtiari*, 913 F.2d 1053, 1063 (2d. Cir. 1990) (enhancement appropriate where defendant had numerous contacts with a broker in which defendant impersonated a Government employee and gave false information); *United States* v. *Walbrook*, No. 92 Civ. 6095, 1993 WL 404065, *2 (S.D.N.Y. Oct. 1, 1993) (enhancement appropriate where a company was defrauded of twenty-nine checks over a three-month period). Accordingly, Hughley's two submissions of CA-1032 forms, and one submission of a misdated duplicate, do not constitute the "repeated acts" which have been held to give rise to an inference of more than minimal planning.

Furthermore, there was no evidence that Hughley's offense fell under either of the remaining two circumstances that warrant the planning enhancement – it involved no more planning than is typical for the offense, and no steps were taken to conceal the offense. Hughley's offense was exceptionally simple and devoid of any plan or scheme. Any "planning" involved in Hughley's offense was limited to that inherent in, and necessary to, the offense of which he was convicted. The false statements on two CA-1032 forms were one-word responses to questions regarding whether he had been employed in the previous fifteen months. Any planning involved in Hughley's offense was minimal, and limited to that typical for the offense. Accordingly, such "planning" is encompassed in the core of activity and reflected in the base offense level. Such purely incidental planning is not a proper basis for imposition of the two-level enhancement which, by definition, is designed to punish significant, atypical planning of an offense.

Likewise, there was no evidence that Hughley attempted to conceal his actions. Indeed, various witnesses at trial indicated that Hughley was consistently open and never attempted to hide his activities. (A. 40, 59, 62-63.) Thus, the more than minimal planning enhancement could not properly have been premised on Hughley taking affirmative acts to conceal his offense.

Imposition of the enhancement was not properly based on any of the three justifications set forth in the Guidelines commentary. Therefore this Court should grant a writ of certiorari to reverse and remand for re-sentencing.

CONCLUSION

This case presents difficult and novel issues arising in cases from all the circuits. The determination of loss under the Guidelines which is not well settled is of continuing importance to future sentencing of defendants. For all the foregoing reasons, petitioner Hughley respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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